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IN THE

Supreme Court of the United States

October Term, 1964

No. 818

JACK H. SCOTT, EDITH L. SCOTT, and SUSAN L. SCOTT, by next friend, JACK H. SCOTT,
Petitioners,

versus

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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December, 1964

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IN THE

SUPREME COURT OF THE UNITED STATES

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No.

JACK H. SCOTT, EDITH L. SCOTT, and SUSAN L. SCOTT, by next friend, JACK H. SCOTT,

Petitioner,

versus

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jack H. Scott, Edith L. Scott, and Susan L. Scott, by next friend, Jack H. Scott, Petitioners, herein pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on November 12, 1964.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is unreported and is printed in Appendix

A hereto, infra; page 13. The judgment of the Circuit Court of Appeals is printed in Appendix A hereto, infra, page 16. The opinion of the United States District Court for the Middle District of Georgia, Columbus Division, is printed in the record at page 343, and the judgment of the United States District Court is printed at page 361.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on *November 12, 1964* (infra, appendix A, page 16). The jurisdiction of the Court is invoked under 28 USC Section 1254 (1).

QUESTION PRESENTED

Is an equestrian riding club located on the Fort Benning military reservation, which is established with the consent of the Post Commander and all of whose activities are subject to the control of the Commanding General of Fort Benning, a "federal agency" within the meaning of the Federal Tort Claims Act?

STATUTES INVOLVED

The Federal Tort Claims Act of 1946, 28 U.S.C. 1346(b) and 28 U.S.C. 2671.

1346, United States as defendant:
(b) Subject to the provisions of Chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands shall have exclu-

sive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945 for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under the circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2671, Definitions:
As used in this chapter and sections 1346 (b) and 2401 (b) of this title, the term — "Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as instrumentalities or agencies of the United States but does not include any contractor with the United States.

"Employee of the Government" includes offices or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

STATEMENT

Basis of Jurisdiction in the District Court, Middle District, Georgia, Columbus Division.

Jurisdiction in the District Court was founded on the Federal Tort Claims Act, Section 1346(b) and Section 1402(b), Title 28, United States Code.

"Section 1402, United States as defendant:

(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the Plaintiff resides or wherein the act or omission complained of occurred."

Facts

On May 17, 1961, Plaintiffs Edith and Susan Scott were injured when a hitching post negligently maintained by civilian employees at the Hunt Club, an equestrian riding club located on Fort Benning military reservation, fell on them. Captain Jack Scott, his wife Edith and daughter Susan brought suit against the United States under Section 1346(b) of he Federal Tort Claims Act. The United States defended in the district court on the grounds that the club was not a "federal agency" within the meaning of Section 2671 of the Federal Tort Claims Act. The United States defended in the district court on the grounds that the club was not a "federal agency" within the meaning of Section 2671 of the Federal Tort Claims Act. The District Court and the Court of Appeals held that the Hunt Club at Fort Benning was not a "federal agency".

Organization of the Club

The Hunt Club was organized in 1956 with the consent of the Commanding General, Fort Benning. Its Constitution stated that it was to be organized as a private association under the provisions of paragraph

2b of Army Regulations 230-5 with the approval of the Commanding General, Fort Benning, Georgia, and that the "Hunt shall not operate as an instrumentality of the Federal Government by individuals acting outside the scope of their official capacity as official employees or agents of the Government." (R. 55, Plaintiff's Exhibit 8, Article II.)

The property on which the club stands is property of the United States Army (R. 234). Several of the buildings on the club property were constructed by the Army and were turned over to the club at the time of its inception. (R. 234)

The Army Regulation under which the Hunt Club was organized, AR 230-5, specifies that organizations such as the Hunt Club shall not be instrumentalities of the United States government[1]. Another part of that

---

[1] 2. Scope.

a. . . . .

b. Private associations and funds thereof, organized, established and operated by individuals acting not within the scope of their official capacity as officers, employees, or agents of the Government, and which are not established to provide essential morale and recreational facilities and services, are not subject to these and other departmental regulations governing nonappropriated funds as defined herein as instrumentalities of the Government. Such associations and funds thereof, except as otherwise provided by law or regulations, shall exist on a military installation only with the written consent of the installation commander. Such consent shall be contingent upon the following requirements and conditions as may be appropriate under the circumstance . . . (6) That such associations are self-sustaining and receive no support assistance, or facilities from the Army or from nonappropriated funds defined in these regulations, except as provided for in AR 210-55 and AR 420-80.

regulation specifies that nonappropriated activities, that is activities carried on on military installations which send their profits to central funds for the use of similar activities on other military installations, shall be instrumentalities of the United States government.[2]

The Stable Officer and the President of the club were directly in charge of the maintenance of the club and they had hired help to maintain the premises. (R. 104) However, Army Post Engineers had done maintenance work around the area. (R. 138, 150, 137, 250, 263, 149, 255) The Signal Corps had on occasion brought bleachers and lighting equipment to the club to be used in shows. (R. 296)

Formal connection with the Army includes these things: The club was organized with the consent of the Commanding General, Fort Benning, monthly financial reports were submitted to military headquarters as were minutes of the meetings of the Board of Governors for approval and auditing, and all of the club's activities were subject to the control of the Commanding General. (Plaintiff's Exhibit 8, Articles X, V, and IX-26, respectively.)

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[2] 3. Definitions. For the purpose of these and implementing regulations, the following definitions apply:

a. Nonappropriated fund. A nonappropriated fund prescribed by these regulations is an entity established by authority of the Secretary of the Army for the purpose of administering moneys not appropriated by the Congress for the benefit of military personnel or civilian employees of the Army and not incorporated under the laws of any State or the District of Columbia. Nonappropriated funds authorized by these regulations are instrumentalities of the United States.

REASONS FOR GRANTING THIS WRIT

This petition for a writ of certiorari to the Fifth Circuit Court of Appeals should be granted for the following reasons:

I. The decision of the Court of Appeals in *Scott v. United States* (Appendix P. 13) is in conflict with the decisions of several federal courts on the question of the liability of the United States for torts committed on facilities established on United States military installations, and particularly in conflict with *Brown v. United States,* (S.D., W. Va., 1951, 99 F. Supp. 685) and *Brewer v. United States,* (M.D., Ga., 1952, 108 F. Supp. 889).

Petitioner finds no federal court decision dealing with recreational facilities located on military installations and established with the consent of military officials in which such facilities have been declared not to be federal agencies. In the following cases, the federal courts have decided that given facilities are federal agencies:

1. *Rizzuto v. United States,* 298 F. 2d 748 (1961, 10th Cir.). A bowling alley operated on a military installation for the benefit and pleasure of members of the armed forces and established under a Central Base Fund is a federal agency.

2. *United States v. Hainline,* 315 F. 2d 153 (1963, 10th Cir.). An aero-club established under an Air Force regulation which specifically desig-

nated such clubs as government instrumentalities is a federal agency.

3. *United States v. Holcombe,* 277 F. 2d 143 (1960, 4th Cir.). A Navy officer's mess, though a non-appropriated fund activity, is a federal agency.

4. *Grant v. United States,* 271 F. 2d 651 (1959, 2nd Cir.). A ship's service store operated as a non-appropriated fund activity is a federal agency.

5. *Robert L. Daniel v. Chanute Air Force Base Exchange,* (E.D. Ill., 1955, 127 F. Supp. 920). A post exchange operated on a military installation is a federal agency.

6. *Fournier v. United States,* (S.D. Miss., 1963, 220 F. Supp. 752). A club which sold drinks is a federal agency.

In *Brown v. United States,* (S.D. W. Va., 1951, 99 F. Supp. 685) the District Court held that a swimming pool maintained by the United States at a naval station for the benefit of servicemen and their families was a federal agency. The Hunt Club at Fort Benning was maintained officially by the United States for the benefit of servicemen and their families. (R. 138, 150, 137, 250, 263, 149, 255).

In *Brewer v. United States* (M.D. Ga., 1952, 108 F. Supp. 889), the District Court held that a civilian swimming pool located at Warner Robins Air Force Base, and constructed, maintained, and under the direct

supervision and control of military personnel was a federal agency. The Hunt Club was partially constructed by military personnel (R. 234) and was partially maintained by Army Post Engineers (R. 138, 150, 137, 250, 149, 255) and was ultimately under the control of the Commanding General (Article IX-26, Plaintiff's Exhibit 8.)

The decision of the Court of Appeals in the case of *Scott v. United States* (Appendix P. 13) is in conflict with the cited decisions in that it requires that the Plaintiff prove extensive connection between the military and the facility before a facility located on military installation property with their consent will be declared to be a federal agency.

II. The decision of the Court of Appeals for the Fifth Circuit in *Scott v. United States* (Appendix P. 13) is in conflict with the Tenth Circuit decision in *Hainline v. United States*, 315 F. 2d 153 (1963, 10th Cir.) on the question of the effect of military regulations on the liability of the United States under the Federal Tort Claims Act.

The *Hainline* court, *supra*, said that an Air Force regulation which stated that all members of aeroclubs established under the regulation were to be "employees" of the United States government:

> "does not purport to, nor could it, enlarge the liability of the United States under the Federal Tort Claims Act or create any new or different definition of the word "employee" as used in the Act . . . (the regulation) does not make them employees in determining the substantive lia-

> bility of the United States under the Act. The fact of employment must be determined under federal law . . . *United States v. Hainline*, 315 F. 2d 153, 156 (1963, 10th Cir.)"

The Fifth Circuit Court in the *Scott case* (Appendix P. 13) held that Army regulations could enlarge or limit the liability of the United States under the Federal Tort Claims Act and could create a new and different definition of "federal agency". The court held that since the Hunt Club was established under Army Regulation 230-5, which regulation made all organizations established under it not "instrumentalities of the United States Government", the Hunt Club was not a federal agency within the meaning of the Federal Tort Claims Act.

III. The decision of the Court of Appeals in *Scott v. United States* (Appendix P. 13) is in conflict with the decision of the Supreme Court of the United States in *Standard Oil Company of California v. Johnson*, 316 U.S. 481, 62 S. Ct. 1168, 89 L. ed. 1611 (1942) on the question of the definition of federal agency.

The Supreme Court held in *Standard Oil Company of California v. Johnson, supra*, that post exchanges operated on military installations were an "arm of the federal government", and that consequently a state tax on gasoline which exempted sales to the "government of the United States or any department thereof" exempted all sales made to Post Exchanges established on the military installations.

> "From all this we conclude that post exchanges as now operated are arms of the government

> deemed by it essential for the performance of governmental functions. They are integral parts of the War Department, share in fulfilling the duties intrusted to it. . . ."

Standard Oil Company of California v. Johnson, 316 U.S. 481, 485, 62 S. Ct. 1168, 89 L. Ed. 1611 (1942). Recreational riding clubs are "integral" to military operations, as are all athletic recreational facilities, and are just as "integral" to military operations as are post exchanges.

IV. The Court of Appeals in *Scott v. United States* (Appendix P. 13) decided an important and substantial question of federal law which should have only been decided by the Supreme Court of the United States.

The Supreme Court of the United States has always encouraged liberal construction of the Federal Tort Claims Act. *Indian Towing Co. v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955).

The decision in *Scott v. United States* (Appendix P. 13) contravenes that policy of liberal construction by requiring the Plaintiff to show either integration with military operations or extensive supervision and control by the military before a recreational facility located on a military installation with the consent of the Commanding Officer there will be declared to be a federal agency within the meaning of the Federal Tort Claims Act.

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

KENT AND KEARNS

L. B. Kent,
Counsel for Petitioner.

Counsel of Record
311 Columbus Bank and Trust Company
Columbus, Georgia

Date_____

CERTIFICATE

I DO HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari has been furnished by mail to opposing counsel of record this _____ day of December, 1964.

_____
L. B. Kent

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 21341

JACK H. SCOTT, EDITH L. SCOTT and
SUSAN L. SCOTT, by next friend, JACK H. SCOTT,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

(October 21, 1964.)

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

PER CURIAM: This suit was brought against the United States under the Federal Tort Claims Act, 28 USCA, §§ 2671-2680, to recover for injuries received by Edith and Susan Scott while on the premises of the Hunt Club located on the Fort Benning military reservation. Under the Tort Claims Act, the United States is liable for the negligence of the employees of any "federal agency." The District Court held that the Fort

Benning Hunt Club was not a federal agency, and that therefore the United States could not be sued for the negligence of its employees. The controlling question presented by this appeal is whether this holding was correct.

The Hunt Club is located on the Fort Benning reservation; and its membership consists primarily of military personnel and their dependents. It is a self-supporting organization receiving no appropriations from the United States Treasury. It maintains a small civilian staff paid entirely out of funds collected from the members. Permission to establish the club was granted by the Commanding General of Fort Benning, and he exercises ultimate authority over its activities. However, the normal activities of the club are overseen by a board of governors elected from its membership. The club's constitution provides that it is a "private association" which "shall not operate as an instrumentality of the Federal Government," and that it was established under Army Regulation 230-5, ¶ 2b. This regulation permits military personnel acting in their unofficial capacities to form "private associations . . . which are not established to provide essential morale and recreational facilities," and exempts these associations from regulations applicable to "instrumentalities of the Government."

We feel that the district judge adequately canvassed the law in this area and correctly concluded that there was insufficient nexus between the Hunt Club and Fort Benning to classify the club as a federal agency under the Tort Claims Act. See *Scott v. United States,* M.D.Ga., 1963, 226 F.Supp. 865. All of the decisions relied on by appellants involve activities which were

essential or integral to military operations, e. g., *United States v. Holcombe,* 4 Cir., 1960, 277 F. 2d 143 (Naval officer's mess held to be a federal agency), or which were subject to greater supervision and control by military authorities, *United States v. Hainline,* 10 Cir., 1963, 315 F. 2d 153 (flying club held a federal agency); *Brewer v. United States,* M.D.Ga., 1952, 108 F. Supp. 889 (swimming pool). In *Rizzuto v. United States,* 10 Cir., 1961, 298 F. 2d 748, apparently holding that a bowling alley is a federal instrumentality for the purposes of 5 U.S.C. § 150k-1, the degree of governmental supervision and control of the bowling alley is not revealed by the decision and record in that case, but we note from the record that, unlike the Army Regulation here involved, the Air Force regulation authorizing the bowling alley provided that activities established thereunder were instrumentalities of the United States Government.

The judgment of the District Court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21341

D. C. Docket No. 951 — C. A.

JACK H. SCOTT, EDITH L. SCOTT and
SUSAN L. SCOTT, by next friend, JACK H. SCOTT,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Middle District of Georgia.

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

October 21, 1964

Issued as Mandate: Nov. 12, 1964

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No. 818

In the Supreme Court of the United States

OCTOBER TERM, 1964

JACK H. SCOTT, EDITH L. SCOTT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 818

JACK H. SCOTT, EDITH L. SCOTT, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 343–361) is reported at 226 F. Supp. 864. The opinion of the court of appeals (Pet. 13–15) is reported at 337 F. 2d 471.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1964 (Pet. 13, 17). The petition for a writ of certiorari was filed on January 8, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a riding club, organized and operated as a private association upon a military reservation with the consent of the installation commander, is a "federal agency" within the meaning of the Federal Tort Claims Act, so that the United States is liable for the negligent conduct of the Club's officers and employees.

STATUTE AND REGULATIONS INVOLVED

The Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671, provides in pertinent part:

> § 1346(b). Subject to the provisions of chapter 171 of this title, the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.
>
> * * * * *
>
> § 2671. *Definitions*
>
> As used in this chapter and section 1346(b) and 2401(b) of this title, the term—
>
> "Federal agency" includes the executive departments and independent establishment of the United States, and corporations primarily acting as, instrumentalities or agencies of the

United States but does not include any contractor with the United States.

"Employees of the government" include officers or employees of any federal agency, members of the military or naval forces of the United States, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States, means acting in line of duty.

Army Regulations 230–5, entitled "Nonappropriated Funds and Related Activities," provides in pertinent part:

2. SCOPE. a. * * *

b. Private associations and funds thereof, organized, established, and operated by individuals acting not within the scope of their official capacity as officers, employees, or agents of the Government, and which are not established to provide essential morale and recreational facilities and services, are not subject to these and other departmental regulations governing nonappropriated funds as defined herein as instrumentalities of the Government. Such associations and funds thereof, except as otherwise provided by law or regulations, shall exist on a military installation only with the written consent of the installation commander. Such consent shall be contingent upon the following requirements and conditions as may be appropriate under the circumstances.

(1) That programs and activities conducted do not prejudice or discredit the military services or other agencies of the United States Government.

(2) That activities will not be conducted in the name of an installation or organization of the Army establishment.

(3) That neither the Army, nor a nonappropriated fund defined in these regulations shall assert claim to the assets of any such association nor shall the Army or any nonappropriated fund incur any obligations on behalf of or assume any of the obligations of such an association.

(4) That such associations will not engage in activities which are in conflict with authorized activities of nonappropriated funds defined in these regulations.

(5) That the nature and authorized function of such associations, together with provision for proper disposition of residual assets and liabilities upon dissolution, will be established in their constitution and by-laws, charter, or articles of agreement.

(6) That such associations are self-sustaining and receive no support assistance, or facilities from the Army or from nonappropriated funds defined in these regulations, except as provided for in AR 210–55, and AR 420–80.

(7) That the installation commander has authority to enforce compliance by such associations with the conditions herein enumerated, to inquire into their activities, and to withdraw his consent for their existence on the installa-

tion if deemed necessary in the interest of the Government.

* * * * *

3. DEFINITIONS. For the purpose of these and implementing regulations, the following definitions apply:

a. *Nonappropriated fund.* A nonappropriated fund prescribed by these regulations is an entity established by authority of the Secretary of the Army for the purpose of administering moneys not appropriated by the Congress for the benefit of military personnel or civilian employees of the Army and not incorporated under the laws of any State or the District of Columbia. Nonappropriated funds authorized by these regulations are instrumentalities of the United States.

STATEMENT

1. The basic facts were found by the district court (R. 344–349) and are undisputed here:

The Hunt Club at Fort Benning was organized as an association of members of the United States Army stationed at Fort Benning, Georgia, to provide facilities for horseback riding there (R. 344–345). Its constitution provided that it was to "be organized as a private association under paragraph 2b of AR 230–5" and that it "shall not operate as an instrumentality of the Federal Government" (App., *infra*, p. 13).[1] Its constitution also provided that its members were to be responsible for the Club's debts and that they would control the distribution of its assets if and when the

[1] "App." refers to the Appendix to this brief which sets forth the constitution of the Hunt Club.

Club dissolved; that, although approval of the Commanding General was a prerequisite to its operation on the post, the Club was to be self-governing, electing its own officers and Board of Governors; and that it was to be financially self-sustaining (App., *infra*, pp. 16–22). The Commanding General gave his consent to the operation of the Hunt Club in a remote area of the military reservation, which had once been a turkey farm (R. 344).

The Hunt Club, in operation, was self-sustaining financially—receiving its income from horse rentals, quartering fees, initiation fees and dues—and paid the government for electricity and other utilities which it used (R. 348). Although on occasion the Club was allowed to borrow, without charge, seats and loudspeaker equipment for horse shows, and Army trucks occasionally hauled wood shavings or sawdust to the Club's stable area, the Army never contributed any money or property to the Club (R. 348). When the Club needed facilities, such as stalls, corrals, and hitching rails, the Club bought the materials and the actual construction was performed by Club members on their own time (R. 347). The Club maintained and repaired such facilities (R. 349, 139, 142, 146–147).

Similarly, the Hunt Club was self-governing. While the Club constitution required its Board of Governors to "act on" any matter which the Commanding Officer of Fort Benning called to its attention (App., *infra*, p. 17), that provision was never called into operation, because the Commanding General never did refer any

matters to the Board of Governors (R. 348–358). The Commanding General did not have any authority to appoint the Board of Governors or officers of the Club, to direct or control its activities, or to set forth regulations or rules for its conduct (R. 360).

On May 17, 1961, petitioner Jack Scott, a Captain in the Army stationed at Fort Benning, was a member and Secretary of the Hunt Club, and owned a horse which was stabled at the Club (R. 349, 93–94, 98–99). His wife and daughter were injured when the horse, while tied to a horizontal hitching rail owned and maintained by the Club, pulled its head back, causing the rail to fall on them.

2. Petitioners brought this action against the United States under the Federal Tort Claims Act, alleging that the injury was due to the negligent construction or maintenance of the hitching rail (R. 3–4, 7). The action was premised upon the theory that the Hunt Club was a federal agency (R. 52–53). The government defended first on the ground that the Hunt Club was not an agency or instrumentality of the federal government, so that the United States was not liable under the Federal Tort Claims Act for the acts or omissions of the Club's officers or employees; alternatively, the government contended that the Club was not in breach of any duty owed petitioners, and that the accident was caused by petitioners' own negligence.

After a full trial, the district court, finding it unnecessary to reach the government's alternative defenses, ruled in a detailed opinion that the Hunt Club

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was not an integral part of the Army and was not subject to the degree of governmental direction and control which characterizes a federal agency within the meaning of the Federal Tort Claims Act. Accordingly, it ruled that the United States was not liable for the conduct of the Club's officers and employees under the Federal Tort Claims Act (R. 343–361).

The court of appeals affirmed *per curiam,* primarily on the basis of the district court opinion. While the court believed that the commanding general exercised "ultimate authority" over the Club in the sense that he could prohibit it from operating on the base, the court agreed with the district court that there was "insufficient nexus" between the Club and the Army to classify the Club as a federal agency under the Federal Tort Claims Act (Pet. 14). The court noted that all of the cases relied upon by petitioners involved nonappropriated fund activities which were expressly organized and operated as instrumentalities of the United States (Pet. 14–15).

ARGUMENT

The sole question presented by this case is whether a riding club, organized and operated as a private association upon a military installation, is a federal agency within the meaning of the Federal Tort Claims Act. While this issue is novel, it is neither important nor difficult. There is no conflict of decisions, and the result reached by both courts below was clearly correct.

1. The Hunt Club was organized as a "private association" of persons acting in their private capacity, and was operated in fact as a self-governing, financially independent private association. The courts below were therefore correct in ruling that it was not a federal agency within the meaning of the Federal Tort Claims Act.

Each of the decisions relied upon by petitioners (Pet. 7–8) involved either (1) a nonappropriated fund activity of one of the armed services, which was expressly organized and operated under regulations expressly making such activities instrumentalities of the United States (see *supra*, p. 5),[2] or (2) a recreational facility operated and maintained directly by the United States.[3] The Hunt Club involved here was

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[2] *United States* v. *Hainline*, 315 F. 2d 153 (C.A. 10), certiorari denied, 375 U.S. 895 (aero club organized and operated as an instrumentality of the United States found to be a federal agency); *United States* v. *Holcombe*, 277 F. 2d 143 (C.A. 4) (United States held liable for negligence of an employee of a Navy officers' mess); *Grant* v. *United States*, 271 F. 2d 651 (C.A. 2) (same for employee of ship's service store); *Daniels* v. *Chanute Air Force Base Exchange*, 127 F. Supp. 920 (E.D. Ill.) (same for employee of post exchange); *Fournier* v. *United States*, 220 F. Supp. 752 (S.D. Miss.) (same for employee of officers' mess). In *Rizzuto* v. *United States*, 298 F. 2d 748 (C.A. 10), a suit by an employee of a Central Base Fund, an instrumentality of the United States, was held barred by the exclusivity provisions of a workmen's compensation statute (5 U.S.C. 150k).

[3] *Brown* v. *United States*, 99 F. Supp. 685 (S.D. W. Va.) (swimming pool operated and maintained by the United States at a naval station); *Brewer* v. *United States*, 108 F. Supp. 889, 891 (M.D. Ga.) (swimming pool was "constructed, maintained and operated by Government agents and was under their direct supervision and control").

plainly not operated by the United States, and the Club's facilities, including the hitching rail which caused the accident, were constructed and maintained by officers and employees of the Club (R. 349, 239–242, 142). There is also a clear difference between the kind of nonappropriated fund activities for which the United States has been held responsible in tort and the Club involved here.

Post exchanges and related activities are usually created by the commanding officer of a base and are operated under the executive direction, supervision, and control of military officers, acting in their military capacity, and receiving pay from appropriated funds. *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 484; *Daniels* v. *Chanute Air Force Base Exchange,* 127 F. Supp. 920 (E.D. Ill.); AR 60–10; AFR 147–7, ¶ 20.[4] Not only are the profits from such activities used for governmental functions but Congress has supported such activities with appropriated funds, and on occasions brought profits from them into the Treasury. *Standard Oil Co.* v. *Johnson, supra,* 316 U.S. at 483–485. In contrast, the Hunt Club was specifically organized as a self-governing private association of persons acting in their private capacity, with the members being responsible for liabilities and having ownership of the assets. And, while the nonappropriated fund activities which are instrumentalities of the federal government are all governed by

[4] While the area club in *United States* v. *Hainline, supra,* was self-governing to a limited extent, it was subject to the supervision of the commanding officer of the base, as well as to detailed regulations (see R. 352–359).

extensive regulations issued by the Secretaries of the Army, Navy, and Air Force and even by statute, private associations, such as the Hunt Club, are excluded from their coverage. AR 230–5, ¶¶ 2b and 3a, *supra*, pp. 3–5;[3] 5 U.S.C. 150k.

It is true that the Hunt Club's constitution provided that "All activities of the Hunt Club will be subject to the approval of the Commanding General, Fort Benning" (App., *infra*, p. 22). However, the record is bare of any suggestion that prior approval of Club activities had to be obtained from the Commanding General or that he had ever prohibited or prevented the Club from doing anything. Rather, this provision merely confirms the inherent power of the Commanding Officer to exercise control, in an ultimate sense, over the activities of any organization on the base, by prohibiting it from operating there. That kind of control, however, is less than that exercised over the employees of independent contractors, and the United States is, of course, not responsible for the conduct of such employees under the Act. 28 U.S.C. 2671, *supra*, pp. 2–3. The decisions of the courts below

[3] Petitioner states that the decision below is in conflict with *United States* v. *Hainline*, *supra*, in that the former held "that Army regulations could enlarge or limit the liability of the United States under the Federal Tort Claims Act and could create a new and different definition of federal agency" (Pet. 9–10), while *Hainline* held to the contrary. In fact, however, the court of appeals here determined that the employees of the club were not employees of a Federal agency on the basis of their relationship with the federal government. It properly considered the regulations as one of several factors in determining this relationship.

are, therefore, wholly consistent with the decisions relied upon by petitioner, and there is no conflict of decisions.

2. The issue presented is, in any event, not of great significance. In the almost two decades since the adoption of the Federal Tort Claims Act, this is apparently the first and only case in which a plaintiff has sought to impose liability upon the United States for the conduct of officers or employees of a private association of persons acting in their private capacity. There is therefore no reason for further review by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX

CONSTITUTION

ARTICLE I—NAME

1. This association of the personnel of Fort Benning will be officially known as the HUNT CLUB. This is the designation under which this organization hereinafter referred to as the Hunt, shall operate and conduct business.

ARTICLE II—AUTHORITY

2. The Hunt shall be organized as a private association under the provisions of paragraph 2b of AR 230–5 with the approval of the Commanding General, Fort Benning, Georgia. The Hunt shall not operate as an instrumentality of the Federal Government by individuals acting outside the scope of their official capacity as official employees or agents of the Government.

3. The Hunt shall be responsible for the upkeep of facilities made available to it by the Commanding General. Repairs to these facilities necessitated by the operation of the Hunt shall be the responsibility of the Hunt. These facilities shall be returned in the condition in which received, except as authorized by the Commanding General.

ARTICLE III—PURPOSE

4. The purpose of the Hunt Club is to provide facilities where members may maintain horses or ponies,

and to provide regulated activities connected therewith. No activities of the Hunt shall substitute for activities conducted by other authorized clubs, associations, or organizations on the post.

ARTICLE IV—MEMBERSHIP

5. Membership in the Hunt shall be open to all military personnel and such additional personnel as authorized in paragraphs 5a and 5b below, and shall include the privileges of use of the facilities of the club by all dependents and guests of said member as set forth in the bylaws of the organization. Membership shall be limited by availability of facilities as determined by the Board of Governors. There shall be the following types of membership:

a. *Honorary Membership:*

Established by this constitution and by the initiating action of the Board of Governors. No responsibility for membership dues or fees, except as outlined hereinafter, and no voting or office holding privileges accrue to such membership in connection with the Hunt. Responsibility does accrue on such membership for payment of fees in effect during the life of membership chargeable for the boarding and maintenance of a personally owned mount, maintenance and repair of personally owned equipment, and/or rental or riding fees for mounts other than those personally owned and maintained by the member as applicable.

b. *Associate Membership:*

Established through invitation from, or by written application to the Board of Governors, and by compliance with pertinent provisions set forth hereinafter. Provisions of Associate Membership shall extend only to individuals and their dependents. Pay-

ment of initiation fees and monthly dues as established by the Board of Governors, and responsibility for no assessments; and no privilege of voting or office holding in connection with the business of the Hunt are features of such Associate Membership.

c. *Regular Membership:*

Established through written application to the Board of Governors and by compliance with the requirements set forth hereinafter, with voting and office holding privileges accruing to the regular member. Qualifications for this membership include:

(1) Payment of initiation fees and monthly dues as established by the Board of Governors.

(2) Agreement to pay pro rata share of any financial assessments that may be determined and levied upon the members by the Board of Governors in accordance with the provisions of the constitution as hereinafter stated.

6. Application for resignation from Regular Membership in the Hunt shall be made in writing to the Board of Governors. Such resignation shall be effective only after all mounts, for which the member is responsible, shall have been removed from the Hunt's facilities and all current accounts and pro rata share of financial responsibility with the Hunt have been settled. Such pro rata share shall be determined by the Board of Governors.

7. Regular and Associate Memberships may be terminated for reported violations of the Constitution, the Bylaws, Stable Regulations, or Post Regulations, or for any other act prejudicial of the interests of the Hunt, if substantiated by investigation by the Board of Governors. The provisions of paragraph 6 above shall apply as appropriate.

8. All general officers, permanently assigned to Fort Benning, and the Chief of Staff of the Post shall be extended honorary membership in the Hunt.

ARTICLE V—OFFICERS

9. The officers of the Hunt shall include a President, Vice-President, a Secretary, a Treasurer, and a Stable Officer. The officers and the Board of Governors shall be elected annually in February by a majority vote of the members present at a meeting called for that purpose. Each member shall be notified in writing at least 5 days prior to date of such meeting. Officers and members of the Board of Governors who cease to be regular members of the Hunt shall be replaced by the Board of Governors.

10. *The Board of Governors.*

a. The Board of Governors shall be comprised of the President, the Vice-President, the Secretary, the Treasurer, the Stable Officer, and not more than four additional members. No two members of the Board of Governors shall be from the same family. No member of the Board of Governors shall be a full time employee of the Hunt Club. The President shall be the chairman of the Board of Governors.

b. The duties of the Board shall be to:

(1) Prescribe the activities, services, and facilities of the Hunt, and the charges, rules, and regulations pertaining thereto.

(2) Rule on membership.

(3) Ascertain that all proper revenues have been received and accounted for, and authorize all expenditures.

(4) Prescribe the responsibilities and authority, and provide for the appointment, of such committees as may be necessary.

(5) Supervise the Vice-President, Secretary, Treasurer, and Stable Officer in the performance of their duties.

(6) Act upon matters presented by the Commanding General.

(7) Consider financial statements, inventories, reports of audits, boards, and committees and take appropriate action.

(8) Advise all members and employees that no member charged with any duty in connection with, nor any employee of the Hunt may accept or receive any gifts, privilege, or prerequisite from the Hunt, or from vendors or vendees of the Hunt.

c. The Board shall meet prior to the fifteenth day of each month. Its proceedings will be recorded, will indicate the members in attendance, and will include the most recent and properly certified financial statements of the Hunt fund. The minutes, signed by the President and Recorder, will be submitted, together with financial statements, to the Post Commander, as required.

11. *The President, and the Vice-President:*

a. The President shall be elected from the regular membership of the Hunt and for a term of one year. He shall be a member of a permanent garrison and shall be the Chairman of the Board of Governors. He shall perform such needed or appropriate tasks as may be required for the efficient conduct of the affairs of the Hunt.

b. The Vice-President shall be the Chairman of the Board of Governors in the absence of the President, and shall perform such other tasks as are prescribed by the President. He shall be a member of the permanent garrison, and shall be elected from the regular membership of the Hunt for a term of one year.

12. *The Secretary, Treasurer and the Stable Officers:*

The Secretary, Treasurer and Stable Officer will be appointed by the President from among the duly elected Board of Governors.

a. The Secretary shall act as recorder to the Board of Governors.

He shall, when directed by, or after obtaining approval of the President, cause appropriate publication of notice for all meetings of the Hunt. Such notice shall include date, time, place, and purpose of the meeting.

b. The Treasurer shall be the custodian of funds and property, and shall receive, disburse, and account for funds in accordance with AR 230–21 as a guide, and the policies and procedures prescribed by this Constitution and the Board of Governors:

(1) The accounting system shall be maintained in accordance with good business practices using AR 20–21 as a guide.

(2) The funds and accounts shall be subject to such audits and inspections as may be prescribed by the Post Commander.

(3) All funds due the Hunt shall be collected by the tenth of each month.

(4) All accounts owed by the Hunt shall be paid by the tenth of each month.

(5) A financial statement will be prepared for presentation at the regular monthly and annual meetings.

(6) The Treasurer shall:

(a) Call on the Internal Revenue Division, Office of the Comptroller for advice with regard to the receipt of monies, the maintenance of bank accounts, and the accounting for funds.

(b) Be financially liable for losses of Hunt funds and property, only where dishonesty, fraud, or obvious negligence on his part is established.

(c) Be responsible for accounts and records of property and transactions pertaining to the establishment, operations, and liquidation of the Hunt.

(d) See that the accounting system is maintained and operations conducted in such a manner as to provide adequate measures of internal control for the prevention of losses through dishonesty of employees or members.

(e) Within the specific authority vested in him by this Constitution, execute contracts in the name of the Hunt.

c. *The Stable Officer.*

The Stable Officer shall supervise and be responsible for the operation of the stables and associated facilities. He shall be assisted in the performance of his duties by such Assistant Stable Officers as may be appointed by the Board of Governors. The Stable Officer shall:

(1) Ensure strict compliance with the Stable Regulations.

(2) Establish and ensure proper stable management procedures.

(3) Initiate procurement of appropriate equipment and feed for the Hunt in accordance with policies and procedures established by the Board of Governors.

(4) Hire and discharge, with the approval of the Board of Governors, the necessary employees for the efficient operation of the stables.

(5) Ensure inspection of the stables as directed by the Board of Governors.

(6) Recommend to the Board of Governors necessary or advisable changes to the published Stable Regulations.

(7) Notify the Secretary and Treasurer by the second of each month as to the assessment to be made against each member for the operation of the stable facilities and for feeding the mounts of respective members.

ARTICLE VI—COMMITTEES

13. The Board of Governors shall provide for the appointment of such committees as may be necessary. The responsibilities, authority, and scope of functions of each committee shall be prescribed by the Board of Governors.

14. The actions of all elected officers and appointed committees shall be subject to review by the Board of Governors.

ARTICLE VII—PROPERTY

15. The property of the Hunt shall consist of such furniture, fixtures, and equipment as may properly come into its possession.

16. If and when the Hunt is dissolved, any unobligated funds and property will be disposed of in accordance with the recommendations of the members of the Hunt.

ARTICLE VIII—REVENUES AND EXPENDITURES

17. The Fort Benning Hunt is a nonprofit organization.

18. a. *Revenues.*

(1) The revenues of the Hunt shall consist of:

(a) Membership fees and/or dues.

(b) Riding fees.

(c) Assessments paid by the Regular Members.

(d) Boarding and maintenance fees.

(e) Proceeds from authorized sales of surplus Hunt property.

(f) Lesson fees.

b. *Expenditures.* The expenditures of the Hunt will comprise payments in connection with Hunt activities. All expenditures will be approved by the President, prior to payment, on the basis of policies established by the Board of Governors as recorded in the minutes of the meetings.

19. Assessments to cover the cost of operation shall be made on a pro rata basis depending on the number of mounts maintained. Special and/or additional feeds shall be provided by the members desiring them.

20. Special assessments may be made for the improvement of, or addition to, Hunt facilities or for special activities sponsored by the Hunt. Such assessments shall be made only with the approval of and in the manner provided by three-fourths of the members present at any meeting called for that purpose. Members shall be advised in writing prior to such meeting. These assessments shall be paid as announced with the notification of such assessment.

ARTICLE IX—GOVERNMENT

21. The Board of Governors shall govern and direct the activities of the Hunt in accordance with the provisions of the Constitution and the Bylaws.

22. There shall be at least one annual meeting of the Hunt, and such other meetings as the President may call. It shall be the duty of the President to call a Hunt meeting upon the written request of one-third of the members. Forty percent of the members shall constitute a quorum.

23. Voting by proxy shall not be permitted.

24. No family shall have more than one vote in elections or at any meeting.

25. Amendments to this Constitution and Bylaws shall be adopted by a two-thirds vote of the members present at any meeting called for that purpose.

26. All activities of the Hunt will be subject to the approval of the Commanding General, Fort Benning.

ARTICLE X—ADOPTION

27. This Constitution and Bylaws shall become effective upon approval by the Commanding General, Fort Benning.

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